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Supreme Court, U.S.
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NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1998

MORRIS PELTIER, JR.
Defendant-Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

APPENDIX
VOLUME I App. A – D

CHARLES R. SONNIER #12260
FRANK W. SUMMERS II #14755
SONNIER & TRAHAN
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR MORRIS PELTIER, JR.

MARK R. TAMMARIELLO #21083
104 Windrush Lane
Lafayette, Louisiana 70506
(318) 261-2118
ATTORNEYS FOR MORRIS PELTIER, JR.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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APPENDIX A

STATE OF LOUISIANA,

PARISH OF ACADIA.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF LOUISIANA:

The Grand Jurors of the State of Louisiana, duly empaneled, sworn and charged to enquire within and for the Parish of Acadia State aforesaid, upon their oath do present THAT _____ at the Parish of Acadia, on or about the 1st day of September in the year of our Lord, One Thou-_____ sand Nine Hundred and Ninety through on or about the 27th day of February, in the year of our Lord One Thousand Nine Hundred and Ninety-two:

COUNT ONE

GEORGE S. YASMINE, BILLY R. CRAWFORD and TIMOTHY J. KERN knowingly stored hazardous wastes at the Marco of Iota, Inc. facility on Louisiana Highway 370 in Acadia Parish in such a manner that they knew or should have known that they thereby placed another person in imminent danger of death or serious bodily injury without a permit or interim status for such storage, in violation of the provisions of La. R. S. 30:2183 (G) (2);

COUNT TWO

PETER F. NICOLOSI, MORRIS PELTIER, JR. and TIMOTHY G. BYRD, SR. knowingly stored hazardous wastes at the Marco of Iota, Inc. facility on Louisiana Highway 370 in Acadia Parish without a permit or interim status for such storage, in violation of the provisions of La. R. S. 30:2183 (G) (1):

contary to the form of the Statute of the State of Louisiana, in such cases made and provided and against the peace and dignity of the same.

/s/ M. Patricia Jones

ASSISTANT ATTORNEY GENERAL

A-3

No. 49 321

STATE OF LOUISIANA

vs.

GEORGE S. YASMINE, BILLY R. CRAWFORD, TIMOTHY J. KERN, PETER F. NICOLOSI, MORRIS PELTIER, JR. and TIMOTHY G. BYRD, SR.

INDICTMENT

Charge:

Count One: Illegal Storage of Hazardous Waste With Knowing Endangerment La. R.S. 30:2183 (G) (2)

Count Two: Illegal Storage of Hazardous Waste La. R.S. 30:2183 (G) (1)

A True Bill

/s/ Joseph L. LeJeune

Foreman of the Grand Jury

Filed August 5, 1994

Karen Perry

Deputy Clerk of Court

APPENDIX B

STATE OF LOUISIANA	**: 16TH JUDICIAL DISTRICT COURT**
VERSUS	**: DOCKET NO. CR 49321 D**
MORRIS PELTIER	**: ACADIA PARISH, LOUISIANA**

***

2.

LaRS 30:2183(G)(1) addresses "any person who willfully or knowingly discharges, emits, or disposes of any substance . . ." The statute specifically does not prohibit storage. In LaRS 30:2173 storage is defined as the "containment of hazardous waste on a temporary basis, for such time as may be permitted by regulations, in such a manner as *not* to constitute disposal of such hazardous waste."

3.

Disposal is defined as the discharge, deposit, injection, dumping, spilling, leaking or placing of any hazardous waste into or on land or water so that such waste, or any constituent thereof, may enter the environment or be emitted into the air or discharged into any waters, including ground waters." Therefore, storage and disposal are mutually exclusive terms.

4.

As the indictment charges storage of hazardous waste, which is not a crime, and the hazardous waste control law contains mutually exclusive definitions for storage and disposal, Morris Peltier cannot be charged with a crime of illegal storage of hazardous waste.

5.

The indictment also charges that Morris Peltier stored hazardous waste without a permit *or* interim status. Under LaCRP Art. 480, it is illegal to charge a crime in an indict-

ment using the disjunctive. As such, the indictment is unconstitutional in that it is duplicitous and fails to sufficiently notify Morris Peltier of the offense charged.

6.

The State has limited the time frame in which Mr. Peltier allegedly committed the charged crime via it's answer to our Bill of Particulars to September 1, 1990 through February 28, 1991.

7.

From September 1990, through February 1991, REO International Corporation, a corporation organized under the laws of the State of Louisiana, was involved in proceedings before the U.S. Bankrupcy Court for the Western District of Louisiana in an effort to provide the financial assistance necessary to assist Marco of Iota, Inc. out of its Chapter 11 bankruptcy proceedings.

8.

On August 24, 1990 a contract to perform "procuring, handling, processing, distributing and blending services" was entered into between Marco of Iota, Inc. and REO International Corporation. That contract, which was filed with the U.S. Bankruptcy Court, was approved by the U.S. Bankruptcy Court on August 27, 1990. (See Exhibit C).

9.

The contract clearly indicates the owner/operator of the

facility is Marco of Iota, Inc. Indeed, in the confirmed plan of reorganization attached hereto as Exhibit D, it is clear the owner/operator of the Marco facility is Marco of Iota, Inc. Under existing regulations found ot LAC 33:V.303(E)(1) it is the owner and operator of the facility who must obtain permits. Therefore, Morris Peltier could not have violated a permit since REO was neither an owner or operator of the facility. However, given the disjunctive nature of the indictment, interim status and the Revised Permit "A" application should be addressed.

10.

On March 29, 1990 the Federal Environmental Protection Agency (EPA) published the "Toxicity Characteristic Rule" or "TC Rule", which expanded the definition of hazardous waste. The TC Rule brought many petroleum based wastes that had not been considered hazardous waste into the hazardous waste system. The rule took effect on September 25, 1990.

11.

The preamble to the TC Rule states:

> If these wastes [newly regulated in the TC Rule] are in a previously unregulated unit, *they will be subject to the self-implementing Federal Standards* for Hazardous Waste Management at 40 CFR 265 until permit issuance (for interim status facilities) for modification for permit facility.

(See SS Fed. Reg. 11848 Attached as Exhibit E).

12.

The EPA preamble also provided instruction to the permittee in the situation in which the state was not authorized to implement the rule:

> Because EPA must implement this rule until the state is authorized to do so, the permittee must comply with federal permit modification procedures under 40 CFR 270.42 *rather than* state permit modification procedures.

(See 55 Fed. Reg. 11848 attached as Exhibit E).

13

The notification requirements under the EPA interim statue rule found at 40 CFR 270.72(a)(1) provide:

> (a) Except as provided in paragraph (b), the owner or operator of an interim status facility may make the following changes at the facility:
>
> (1) Treatment, *storage*, or disposal of new hazardous wastes not previously identified in Part A of the permit application (and, in the case of newly listed or indentified waste, addition of the units being used to treat, store, or dispose of the hazardous waste on the effective date of the listing or identification) *if the owner or operator submits a revised Part A permit application* prior to such treatment, storage, or disposal; (See Exhibit F).

14.

On September 24, 1990 Marco sent to *EPA* a revised

part "A" Interim Status Application providing that Marco was claiming interim status for handling additional hazardous wastes due to the TC Rule as well as drum storage of these newly regulated hazardous wastes. *A copy was also provided to DEO.* (See Revised Part 1, Subsection "A", Interim Status Application attached as Exhibit G).

15.

Therefore, Marco, who was the owner/operator of the facility, and who was subject to the continuing scrutiny of the U.S. Bankruptcy Court where the LDEQ was represented through its counsel, complied with the existing federal law when it submitted its application in September, 1990. Further, although DEQ did not adopt the state version of the TC Rule until April 20, 1991, Marco's notification to DEQ regarding its additional hazardous wastes and subsequent drum storage of those hazardous wastes pursuant to the EPA TC Rule, also satisified the state requirement for such changes even though the State was not clear what the requirements were.

16.

On September 14, 1990, the Louisiana DEQ, through its counsel of record, filed into the bankruptcy record an official objection to the August 24, 1990 contract due to a need to make a "determination as to the department's jurisdiciton." (See Exhibit H).

17.

On December 6, 1990, the DEQ, through its counsel, entered into a joint stipulation, also approved by the Bankruptcy Court, whereby "all materials delivered under

the contract between REO and Marco will be delivered, placed, managed, blended and/or processed only at the Iota facility and only in Tnak S-5 provided that, as represented by Marco, the processing and management of the materials made the subject of this contract, as well as all other materials, is in accordance with all applicable requirements under the Louisiana Hazardous Waste regulations, *pending determination of interim status under the DEQ regulation for tanks other than the S-5 tank. Once the status of the other tanks is determined by the DEQ, then the DEQ may give approval for Marco's use of other tanks for processing and storage."* (Emphasis added). (See Exhibit I).

18.

Thus, as late as December 6, 1990, the LDEQ, through its counsel of record in proceedings before the U.S. Bankruptcy Court for the Western District of Louisiana, not only had uncertainty as to its own jurisdiction, but as to the interim status of the facility itself. The fact is interim status did exist under state law as well.

19.

One of the regulations in effect in 1990, LAC 33:V.4303(a)(1), which included requirements for interim status facilities, provided for any changes occurring at the permitted facility and required notification of any such change (just as the federal regulation), as follows:

> 4303. Changes during interim status.
>
> (A) Except as provided in LAC 33 V.4303(b), the owner or operator of an interim status facility may make the following changes at the facility:

(1) Treatment, storage, *or disposal of new* hazardous waste not previously identified in Part 1 of the permit application (and, in the case of newly listed or identified waste, addition of the units being used to treat, store, or dispose of the hazardous waste on the effective date of the listing or identification) if the owner or operator submits a revised Part I permit application prior to such treatment, *storage,* or disposal.

(See Exhibit J).

20.

Thus, during the time frame from September 1, 1990, through February 28, 1991 and even though DEQ did *not* have permitting authority, not only could Morris Peltier *not have been a permit holder,* even if he were a permit holder, interim status for storage was obtained by virtue of the Revised Part A application submitted to the federal government.

21.

Obviously, the State must now disagree with this interpretation, but the fact remains their experts and lawyers were not sure in December of 1990 if they did or did not have interim status! If the existing regulations, when subjected to legal scrutiny, can result in differing beliefs by the experts and lawyers whether the facility had interim statuts under administrative regulations, the U.S. Supreme Court has stated that administrative regulations accompanied by criminal sanctions should not leave a businessman, such as Morris Peltier, "left to guess the meaning of regulations." *U.S. v. Mersky,* 361 U.S. 431 (1960).

WHEREFORE, Morris Peltier prays that Count 2 of the indictment against him be quashed.

Respectfully submitted,

/s/ Morris Peltier

MORRIS PELTIER
920 WEST PINHOOK RD.
SUITE 328
LAFAYETTE, LA 70503
(318) 269-1451

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this day been forwarded to U.S. Attorney, Patricia Jones by placing same in the United States mail, postage prepaid and properly addressed.

Lafayette, Louisiana on this 31st day of May, 1996.

/s/ Morris Peltier

Filed 5-31- 1996
/s/ Illegible
DV. CLERK OF COURT
ACADIA PARISH, LA.

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA

In re:

Marco of Iota, Inc. Case No. 89-50937-LO-11

Debtor Chapter 11

EX PARTE MOTION AND ORDER FOR AUTHORITY TO ENTER INTO CONTRACT TO PERFORM BLENDING SERVICES

NOW INTO COURT, through undersigned counsel, comes MARCO OF IOTA, INC., debtor in possession, who, with respect represents as follows:

1)

Debtor in possession is in the business of refining and/or blending petroleum products at both its plant installations in Iota and Crowley, Louisiana.

2)

Debtor in possession has received an offer to enter into a contract to perform blending services with REO INTERNATIONAL, CORPORATION under the terms and conditions as set out in said contract, a copy of which is attached hereto and made a part hereof as Exhibit "1".

3)

Debtor in posssession asserts that this contract would be mutually beneficial to **MARCO and REO** and as such beneficial to all creditors of the estate and in the best interest of the estate herein.

4)

Debtor asserts that said contract is not outside the normal business operations of **MARCO OF IOTA, INC.** and that debtor in possession is fully capable of performing its obligations under the proposed contract immediately.

5)

Debtor in possession asserts that there is insufficient time within which to notice all creditors of the estate due to the fact that the products to be blended are ready for immediate blending and that further delays in the execution of this contract may result in price changes in the petroleum market such that this contract would no longer be economically advantageous to the debtor herein.

WHEREFORE, debtor in possession prays that this Honorable Court authorize an ex parte order permitting **MARCO OF IOTA, INC.** to enter into a contract to perform blending services with **REO INTERNATIONAL, CORPORATION** under the terms and conditions that are set forth in the attached copy of said contract.

Respectfully submitted,

JOHN HAAS WEINSTEIN, APLC

BY: /s/ Patrick J. Mangan

PATRICK J. MANGAN
P.O. BOX 8
(318) 948-4700
ATTORNEYS FOR
MARCO OF IOTA, INC.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA

FILED
AUG 27 1990

In re:

Marco of Iota, Inc.	Case No. 89-50937-LO-11
Debtor	Chapter 11

****

EX PARTE ORDER AUTHORIZING DEBTOR TO ENTER INTO CONTRACT TO PERFORM BLENDING SERVICES

The Court considering the Ex Parte Motion of Debtor in Possession to enter into a contract to perform blending services, filed herein, and the Court being of the opinion that same would be in the best interest of the estate and not prejudicial to any creditor herein:

IT IS ORDERED, that **MARCO OF IOTA, INC.** be and is hereby authorized to enter into that certain contract to perform blending services with **REO INTERNATIONAL, CORPORATION,** under the terms and conditions outlined in said contract, a copy of which is attached and made part of debtor's original motion herein.*

---

* Further Ordered that debtor's counsel notice this Order by September 1, 1990, with such notice to advise that any party objecting to the continuation of performance under the contract shall file a written objection

OPELOUSAS, LOUISIANA this 27 day of August, 1990.

/s/ Louis M Phillips

Louis M. Phillips
U.S. BANKRUPTCY JUDGE

---

footnote * continued

by September 14, 1990 and notice with objection at 9:15a.m.

bankruptcy record in certified form — there are a lot of documents in it.

MS. JONES: No objection, Your Honor.

THE COURT: Let it be made part of the record.

[EXHIBIT D-1 IN GLOBO INTRODUCED]

MR. BURNS: Your Honor, I have just a few questions of this witness.

THE COURT: All right, go ahead.

DIRECT EXAMINATION

BY MR. BURNS:

Q. Mr. Weinstein, isn't it a fact that subsequent to the plan of reorganization this bankruptcy was indeed reopened in 1992 and 1993?

A. You would have to show me some documents to refresh my memory. I may have been, but I just can't recall.

Q. In fact — well, I'll ask you if you remember. Do you remember, in fact, doing a letter and a motion to reopen this bankruptcy filed by Mr. Kern and REO because of misrepresentation in the plan?

A. If you could show me those documents —

Q. I don't have the documents with me.

A. I don't recall. That may have occurred but, once again, this is not the only case that I filed.

Q. I understand.

MR. BURNS: Thank you, Your Honor.

[The Witness Was Excused]

MR. HANNA: Judge, I would not call the last witness if the Court will permit me about two minutes of argument on the issue of the regulation.

THE COURT: No, I don't want to hear that right now.

MR. HANNA: All right. Then I have no further witnesses, Judge.

THE COURT: Then let me proceed with what I have to say about this.

BY THE COURT:

We have in this case motions to quash the indictment by Peter Nicolosi, Timothy G. Byrd, Morris Peltier, Timothy J. Kern, and Mr. George Yasmine. We also have motions by Nicolosi, Byrd & Peltier to reconsider this evidence, and we have motions for additional discovery by Nicolosi, Byrd & Peltier.

The defendants Nicolosi, Byrd and Peltier are charged

with the storage of hazardous waste without a permit or interim status, in violation of LA. R.S. 30:2183(G) (1). Defendants Timothy J. Kern and George Yasmine are charged with storage of hazardous waste with knowledge of placing others in imminent danger or serious bodily injury without a permit or interim status, in violation of LA. R.S. 30:2183 (G) (2). So I may be referring to G1 and G2.

All the defendants have moved to quash the indictment, and all of the defendants argue the indictment charges them in an impermissible disjunctive manner by using the word "or", in contravention of Louisiana Code of Criminal Procedure Article 480. Article 480 prohibits charging crimes in the alternative when the crime is one that can be committed in a number of ways. The Court agrees with the State's assertion that the alleged crimes are not charged alternatively because the crime can only be committed in one way: To store hazardous waste without a permit and without an interim status permit. This is not a crime that can be committed in a number of ways. So Article 480's prohibition does not require quashing the indictment, and the Court will so rule.

Now Defendants Kern and Yasmine have adopted the arguments where the facts apply to them as given by Nicolosi, Byrd and Peltier. Now since Defendants Kern and Yasmine have been charged with violating G-2, as I will refer to it, and not G-1, the Court finds only the issue of the impermissible use of the disjunctive "or" which is present in both statutes to be applicable to the Defendants Kern and Yasmine, and I will at this time consider oral argument on that point as to those two.

MS. JONES: Your Honor, I think I may have lost you. That would be on the disjunctive —

THE COURT: Yes, the disjunctive. That's all we're talking about.

MS. JONES: — with regard to Kern and Yasmine under G-2?

THE COURT: Right. All right, let's let Mr. Burns argue that point. Will your argument cover both clients or not?

MR. LOPEZ: I would think so, Your Honor, but I —

THE COURT: If it's deficient, Ed, you can say something additional. All right?

BY MR. BURNS:

Your Honor, I would submit that we have adequately briefed it, so I will be very brief.

Count 1 of the indictment says that Timothy J. Kern and George Yasmine knowingly stored hazardous waste at the Marco of Iota, Inc. facility in a manner where they knew or should have known. . . that placed another person in imminent danger of death or serious bodily injury, and without a permit or interim status.

I think that these are disjunctive, that the Supreme Court decision concerning disjunctive are applicable, and that Count 1 should be quashed as to these two defendants.

MR. LOPEZ: We would adopt that argument, Your Honor.

THE COURT: All right, Ms. Jones?

BY MS. JONES:

Thank you, Your Honor. With regard to the defendants' argument that the charge is disjunctive because it says "without interim status or a permit," the State will make the same argument we made in the memorandum regarding G-1, which is this crime can be only committed in one way as far as that is concerned. There has to be no permit and no interim status in order for there to be a crime.

With regard to the mental state required for "knew or should have known" and the "imminent danger" posed of "great bodily injury" or "death," I submit that perhaps I should have charged it with an "and," and that Article 480 perhaps does apply to those aspects of the indictment. However, Your Honor, I did not put this in the memorandum could I didn't think it was necessary. Those issues were only raised in the memorandum filed recently, that Article 480 does not in fact require conjunctive charges, it permits conjunctive charges. And Article 5 of the Code of Criminal Procedure in fact says that the word "may" is to be construed as permissive. And if Your Honor would look at Article 480, it says that "If the offense may be committed in more than one way, it may be charged conjunctively or set forth conjunctively in a Bill of Particulars.

In this case the defendants had not even asked for a Bill of Particulars to clear up any confusion that exists about

whether they're charged with both of these states of mind and both of the imminent dangers to death and to great bodily harm. If they file a Bill of Particulars I will answer with an "and," and that will solve everything, and that satisfies Article 480.

Additionally, as I mentioned earlier, I don't think Article 480 prohibits disjunctive charges because it doesn't use the words "shall be charged conjunctively." It only says "may be charged conjunctively."

And the cases which the defendant cites are prior to the enactment of Article 480. They are in the prior article under the prior code, and I'm not sure what language it used because I wasn't able to get a copy of the old article before today. So I don't think the cases can apply unless the defendants can specify what the wording of those cases is.

Additionally, Your Honor, I would make the same argument I made with regard to the G-1 defendant, which is if there is an error, if the Court finds a defect, it's a formal defect and the indictment can be amended pursuant to Article 532 Subsection 2 and Article 487 of the Code of Criminal Procedure. The Code specifically provides that if there is a formal defect in violation of those chapters of the Code, that the Court can permit an indictment. And I will be glad to amend the indictment to put an "and" at both of those places in the indictment. And I think that would satisfy everything, even if there is a defect.

Or, Your Honor, if the defendants file a motion for a Bill of Particulars, I will answer it.

BY MR. BURNS:

Your Honor, briefly, Article 480 — she is correct — says "may charge conjunctively." That's not our argument. They did charge disjunctively, and that's what's improper. And it was presented to the grand jury, and the grand jury — we do not know how they based their opinion for probable cause.

I submit to the Court that the State is correct, that the proper remedy is either to file a new Bill of Information or a new indictment.

THE COURT: Well, I disagree, and I'm going to overrule your objection on that point.

BY THE COURT:

Defendants Nicolosi, Byrd & Peltier further argue that the storage of hazardous waste does not constitute a violation of G-1 because the statute only prohibits unpermitted discharge, emission or disposal of hazardous waste. Finally, they argue that G-1 is unconstitutionally vague because the statute does not set forth specifically proscribed acts so as to put the defendants on notice as to what constitutes a criminal act, and hence, to prepare a defense thereto.

As to the Defendants Nicolosi, Peltier and Byrd's assertions that the statute is invalid and unconstitutionally vague, the State acknowledges that "storage" is not a specifically proscribed act under G-1. The State argues that the defendants are really charged with violating the section of 2183 (G) (1) which prohibits any person from knowingly violating

any provision of Chapter 30, the Louisiana Hazardous Waste Control Law which is referred to as "LHWCL."

In LA. R.S. 30:2202 (B) the LHWCL prohibits the violations of the regulations promulgated by the Louisiana Department of Environmental Quality. The Louisiana DEQ regulations are promulgated in the Louisiana Administrative Code referred to as "LAC."

Under LAC 33:105 (F) and 33:V.303B, it is impermissible to store hazardous waste without a permit or interim status permit. Therefore, the State contends it can validly charge these three defendants with violating LA. R.S. G-1 for storage of hazardous waste without a permit or interim status permit.

Under LA. C.Cr.P. Art 464, an indictment must be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated.

In *State v. Union Tank Car Company,* 439 So.2d 377, our Supreme Court addressed the constitutional requirements of definiteness as follows:

> "The constitutional requirement of definiteness derives from the due process clauses of the United States and Louisiana Constitutions, and from Article 1 Section 13 and 16 of the 1974 Louisiana Constitution. Under these provisions, in order to pass constitutional muster, a criminal statute must meet two requirements. First, it must give adequate notice to individuals that certain

contemplated conduct is proscribed punishable by law. Secondly, it must provide adequate standards for those charged with determining the guilt or innocence of an accused.

In connection with the requirement of adequate notice, this court has held that a penal statute must describe unlawful conduct with sufficient particularity and clarity that ordinary men of reasonable intelligence are capable of discerning its meaning in confirming their conduct thereof. Likewise, the requirement of adequate standards for ascertaining guilt mandates that a criminal statute mark boundaries sufficiently distinct for judges and juries to administer the law in accordance with the legislative will.

The criminal code itself requires that penal statutes must be strictly construed and cannot be extended to cases not included with the clear import of their language, and that nothing is a crime which is not clearly and unmistakably made a crime. The rules of strict construction applicable to the interpretation of penal statutes are also required in the interpretation of penal regulations."

In *State V. Dousay,* 378 So.2d 414, the Court further stated:

"The constitutional requirement of definiteness is satisfied when the language of a criminal enactment has a generally accepted meaning, such that a person of ordinary intelligence would be given fair notice of what conduct is forbidden, or when the crucial words

or phrases in the criminal statute have a fixed and definite meaning for the person of ordinary intelligence.

When, as here, administrative regulations are accompanied by criminal sanctions, the United States Supreme Court has stated that businessmen must not be left to guess the meaning of regulations."

The Court finds that there is a lack of definiteness as to what the state of the law was at the time of the alleged criminal activity. Furthermore, the Court finds that the section of the statute relied on by the State, namely the "catch-all" section prohibiting any person who otherwise knowingly violates any provision of the Chapter to be subject to criminal sanctions, to be so overbroad as to be unconstitutionally vague since it does not specifically state charges against these three defendants so as to allow them to adequately prepare for a defense.

For these reasons, the Court hereby grants the motions to quash by Defendants Nicolosi, Byrd & Peltier. Defendants Kern and Yasmine's motion to quash is denied, as the Court finds no merit in their arguments since they were charged under another statute; namely G-2, and the arguments rendering G-1 unconstitutionally vague do not apply, in the Court's opinion, to G-2.

As a result of this ruling, the motions to reconsider severance and for additional discovery by Defendants Nicolosi, Byrd & Peltier are rendered moot by the Court's ruling.

MS. JONES: Your Honor, the State would notice

its intention to appeal or take writs from the Court's ruling.

THE COURT: All right, we will note it for the record.

MR. BURNS: Your Honor, on behalf of Mr. Kern we would state the same objection to the court's ruling.

THE COURT: We will note that for the record, also.

MR. LOPEZ: And as to Mr. Yasmine, also, Your Honor.

[THE PROCEEDING WAS CONCLUDED]

CERTIFICATE OF COURT REPORTER

I, MARILYN RICHARDSON, C.S.R., do hereby certify that I am a duly appointed, qualified, and acting official court reporter for the 15th Judicial District Court in and for the Parishes of Acadia, Lafayette, and Vermilion, the state of Louisiana.

I further certify that the foregoing *53* pages is a true and correct transcript of the proceedings held in the captioned cause and that said transcript is a true and correct transcription of my stenographic notes then and there taken.

Lafayette, Louisiana, this *22nd* day of *July*, 1996.

/s/ Marilyn Richardson
MARILYN RICHARDSON, C.S.R.
Official Court Reporter, Div. J
Certification #87001

Filed: *Aug. 19, 1996*
s/ Paula M. Stafford

A TRUE COPY OF THE ORIGINAL

/s/ Gretchen S. Bertrand
DEPUTY CLERK OF COURT
ACADIA PARISH, LA.

APPENDIX D

SUPREME COURT OF LOUISIANA

No. 96-KA-2302

MAR 13 1998

STATE OF LOUISIANA

Versus

TIMOTHY G. BYRD, SR., MORRIS PELTIER AND PETER F. NIGOLOSI

ON APPEAL FROM THE FIFTEENTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF ACADIA, HONORABLE DON AARON, JR., JUDGE

JOHNSON, Justice*

In this case, we must decide whether the trial court erred in holding a state statute unconstitutional on the basis of vagueness. The defendants were indicted for violating La. R.S. 30:2183(G)(1) by knowingly storing hazardous waste at their Marco of Iota, Inc. facility located on Louisiana Highway 370 in Acadia Parish. Following a hearing on defendants' motion, the trial judge quashed the indictment, finding that the "catch-all" provision contained within the statute was so overbroad, it was rendered unconstitutionally vague.

---

* Victory, J., not on panel. See Rule IV, Part 2 § 3.

Pursuant to La. Const. art. V, § 5 (D), the State filed a direct appeal to this court. Although language contained within the "catch-all" provision of La. R.S. 30:2183(G))1) is somewhat expansive because it refers the reader to the entire Chapter on Hazardous Waste Control, we find that the trial court erred in holding the statute unconstitutional. Additionally, we find that the statute does not constitute an unauthorized delegation of legislative authority.

FACTS AND PROCEDURAL HISTORY

Pursuant to an indictment issued by an Acadia Parish Grand Jury, the defendants, Peter F. Nicolsi, Morris Peltier, Jr. and Timothy G. Byrd, Sr. were charged with violating La. R.S. 30:2183(G)(1).[1] The indictment charged that each of these defendants knowingly stored hazardous waste at their facility located in Acadia Parish, without a permit or interim status for such storage. The indictment further charged George S. Yasmine, Billy R. Crawford and Timothy J. Kern with violating La. R.S. 30:2183(G)(2) for knowingly storing hazardous waste at the same facility.[2]

The defendants assert that their involvement in Marco stems from Marco's filing for bankruptcy. On October 24, 1989, Marco, a Louisiana corporation, filed for protection

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[1] These charges composed count two of the indictment which was filed on August 5, 1994.

[2] Count one of the indictment charged Yasmine, Crawford and Kern with knowingly storing hazardous waste at the Marco of Iota, Inc., facility in such a manner that they knew or should have known that they thereby placed another person in imminent danger of death or serious bodily injury without a permit or interim status for such storage.

under Chapter 11 of the U.S. Bankruptcy Code. The defendants assert that because Marco was a hazardous waste storage facility, the bankruptcy was "heavily litigated," and the bankruptcy court was "much more strict" and required "much more detail than what ordinarily goes into a plan of reorganization."[3] John Weinstein, an attorney who testified at the motion to quash haring, characterized Marco as "a fuel-blending partially hazardous waste storage facility."[4]

In September of 1990, defendant Peter F. Nicolosi became president of a company known as Reo International. Defendant Timothy Byrd was the secretary-treasurer, and defendant Morris Peltier was employed as a consultant. Reo was a separate corporation whose role in the bankruptcy was to recapitalize marco so that it could satisfy its creditors. After confirmation of the reorganization plan, Marco was to reissue its stock to Reo in consideration for the recapitalization.

Each of the three defendants in May of 1996 filed a motion to quash allegaing the following: 1) the indictment failed to charge an offense which is punishable under a valid statute; 2) the indictment contains an improper misjoinder of offenses[5] and 3) R.S. 30:2183(G((1) is unconstitutionally vague. Specifically, defendants argued that there was no crime for "storage" of hazardous waste within R.S. 30:2183(G)(1) and that the attempt to utilize the body of hazardous waste regulations as the basis of the charge against

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[3] Weinstein represented Marco, the debtor, in their bankruptcy case filed in the United States Bankruptcy Court, Western District of Louisiana.

[4] The Louisiana Department of Environmental Quality was a creditor of Marco and was represented at most of the hearings.

[5] The trial court rejected this argument and neither party raises it on appeal.

them failed to give adequate notice and provide adequate standards. Defendants contend that by virtue of the state's first response to their motion for a bill of particulars, (i.e., "See indictment") the state was effectively charging them with violating the entire body of hazardous waste regulations (via R.S. 30:2183(G((1) and 30:2202(B))[6] Defendants further contend that at the time of the alleged conduct, the Marco facility was in full compliance with the Louisiana Hazardous Waste Control Law (HWCL) and the hazardous waste regulations and that Reo did not own or operate the Marco facility at that time.

On July, 10, 1996, the trial court conducted a hearing which encompassed defendants' motions to quash.[7] At the conclusion of the hearing, the lower court opined that the indictment lacked definiteness as to what activity was prohibited by the statute at the time of the alleged violations. After hearing testimony from Weinstein regarding the bankruptcy case, the trial court quashed the indictment.[8]

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[6] Secondarily, defendants also note that some of the regulations cited by the state in their amended and supplemental answer to defendants' motion for bill of particulars were not in effect at the time of the alleged conduct. This argument, however, was not raised in defendants' motion to quash nor was it raised at the hearing and consequently was not a basis for the trial court's decision.

[7] There were several motions set for consideration, including motions for additional discovery, and motions to reconsider severance. Also, Yasmine, Crawford and Kern filed motions to quash the charges outlined in count one of the indictment.

[8] Weinstein testified that he represented Marco in their bankruptcy proceeding. He went on to testify that the issue of whether Marco was properly permitted was litigated during the bankruptcy proceedings. The defense attrorney went on to question Weinstein about Reo's role in the bankruptcy proceeding as well as marco's compliance with the hazaardous waste regulations. Weinstein responded that his specialty was

In quashing the indictment, the district court found:

> "there is a lack of definiteness as to what the state of the law was at the time of the alleged criminal activity. Furthermore, the court finds that the section of the statute relied on by the State, namely the "catch-all" section prohibiting any person who otherwises knowingly violates any provision of the Chapter to be subject to criminal sanctions, to be so overbroad as to be unconstitutionally vague since it does not specifically state charges against these three defendants so as to allow them to adequately prepare for a defense."

The trial court based its ruling upon two cases dealing with constitutional vagueness, *State v. Union Tank Car Co.*, 439 So.2d 3k77 (La. 1983) and *State v. Dousay,* 378 So. 2d 414 (La. 1979). The trial court determined that there was no basis to quash count one of the indictment. However, the motions to quash count two filed on behalf of Nicolsi, Peltier and Byrd were granted. This opinion only involves the violations listed in count two.

The parties presented their arguments before this court on October 20, 1997, at which time the defendants alleged that the crime with which they were charged was created by a state agency and constitutes an improper delegation of legislative authority. At the conclusion of oral argument, the parties were instructed to file supplemental briefs on this issue.

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footnote 8 continued

bankruptcy and not environmental compliance and consequently, he could not state whether Maraco was in compliance with the hazardous waste regulations.

DISCUSSION

Delegation of Legislative Authority

Under proper circumstances, our case law allows the delegation of legislative authority to executive agencies. In *Schwegmann Brothers Giant Super Mkts. v. McCory,* 237 La. 768, 112 So.2d 606 (La. 1959), this court concluded that our Legislature may confer authority on administrative boards and commissions to determine the facts or state the things upon which the law intends to make its action depend. There, we found:

> "It is now well settled that the Legislature may make the operation or the application of a statute contingent upon the existence of certain conditions, and may delegate to some executive or administrative board the power to determine the existence of facts and to carry out the terms of the statute. So long as the regulation or action of the official or board authorized by statute does not in effect determine what the law shall be, or involve the exercise of primary and independent discretion, but only determines within the prescribed limits some fact upon which the law by its own terms operates, such regulation is administrative and not legislative in its nature."

Schwegmann, 112 So.2d at 613; *State v. All Pro Paint & Body Shop, Inc.* 93-1316 (La. 7/5/94); 639 So. 2d 707.

While an administrative agency can conduct ministerial or administrative duties, to determine whether a statute unconsitutionally delegates legislative authority to such agency our jurisprudence employs a three-prong analysis which is